Heng Poh Glass Sdn Bhd v Chong Lan Moy & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–1536 OF 2010
SEE MEE CHUN JC
24 SEPTEMBER 2013

Bankruptcy — Capacity of bankrupt — Sale of land by undischarged bankrupt — Competency to enter into contract — Claim against bankrupt for specific performance of sale and purchase agreement — Whether contract void

Contract — Formation — Subject to contract — Sale and purchase agreement for sale of land — Draft agreement prepared pursuant to negotiations — Vendor's lawyer's letter containing words 'Subject to contract' — Sale and purchase agreement not concluded within stipulated 21 day period — Earnest deposit of 2% paid by purchaser — Amendment made to terms of agreement — Whether contract formed despite non-execution of formal agreement — Whether essential terms sufficiently identified — Whether valid contract formed

Contract — Sale and purchase of land — Breach — Specific performance — Land disposed to third party — Whether specific performance could be granted — Whether damages appropriate remedy

The plaintiff claimed for specific performance of a sale and purchase agreement ('SPA') for the purchase of a land ('the land') which the plaintiff said was concluded on 1 July 2010. Alternatively the plaintiff claimed for refund of RM65,000 paid as earnest deposit and an equivalent sum of RM65,000 as liquidated damages. The defendant denied there was ever any agreement concluded but only negotiations and a draft agreement. The defendant contended that if at all there was any agreement reached, the plaintiff's subsequent proposal of an amendment and the lack of a duly executed agreement within the required 21 days meant there was no concluded agreement. Further it was argued that D2 had been adjudged a bankrupt and lacked the capacity to enter into any contract. The plaintiff had paid the defendant RM65,000 as earnest deposit which represented 2% of the 10% deposit. The plaintiff's director had signed the SPA and had issued the balance deposit of RM260,000 by cheque. The defendant however had not signed the SPA.

Held, allowing the plaintiff's claim for damages and dismissing the defendant's counterclaim with costs:

(1) The plaintiff's offer letter to purchase dated 1 June 2010 setting out parties, property and purchase price was an 'open contract' (see para 8).

(2) The argument that the defendant's lawyer's letter of 26 May 2010 to the plaintiff's lawyer which prompted the plaintiff's offer letter of 1 June 2010 had the words 'Subject to contract' showed a formal contract was required was negated by its own conduct on 1 July 2010 requiring plaintiff's lawyer to fair the SPA. Although D2 had said he did not agree with all the terms and conditions in the plaintiff's offer letter he nevertheless agreed with the condition on purchase price and earnest deposit. The lack of a formally executed SPA by both parties did not necessarily mean there could be no concluded agreement (see paras 10–11).

(3) The words 'subject to contract' does not mean a formal contract must be executed before it can be said there is a binding contract. It all depends on the facts of the case and the factual matrix here shows there need not be a formal contract (see para 12).

(4) The lack of a formal agreement within the stipulated 21 working days did not detract from the plaintiff's case for the reasons that a formal agreement was not necessary to prove the existence of a concluded agreement and the conditions in the offer letter were to be read as a whole (see para 13).

(5) The amendment did not detract from the finality of the concluded agreement as at 1 July 2010 (see para 15).

(6) Although there was no payment of the balance 8% this did not mean there was no concluded agreement (see para 16).

(7) D2 being a bankrupt did not lack the capacity to enter into any agreement (see para 17).

(8) As the land had been disposed to a third party specific performance was not appropriate such that the alternative claim was allowed (see para 20).

[Bahasa Malaysia summary

Plaintif menuntut untuk pelaksanaan spesifik terhadap perjanjian jual beli ('SPA') untuk pembelian tanah ('tanah') yang mana dikatakan telah selesai oleh plaintif pada 1 Julai 2010. Plaintif secara alternatif menuntut untuk pemulangan wang sebanyak RM65,000 sebagai ganti rugi pembubaran. Defendan menafikan bahawa terdapat apa-apa perjanjian yang telah selesai tetapi hanya perundingan dan draf perjanjian. Defendan berhujah bahawa jika ia pun terdapat apa-apa perjanjian yang dicapai, cadangan selanjutnya oleh plaintif terhadap pindaan dan ketiadaan perjanjian yang dimeterai dalam masa 21 hari yang diperlukan bermaksud tidak terdapat perjanjian yang selesai. Selanjutnya ia berhujah bahawa D2 telah dihakimi sebagai bankrap dan tidak mempunyai kapasiti untuk memasuki apa-apa kontrak. Plaintif telah membayar defendan RM65,000 sebagai deposit cengkeram yang mewakili 2% daripada 10% deposit. Pengarah plaintif telah menandatangani SPA tersebut

dan telah mengeluarkan deposit baki sebanyak RM260,000 dengan cek. Defendan walau bagaimanapun tidak menandatangani SPA tersebut.

Diputuskan, membenarkan tuntutan plaintif untuk ganti rugi dan menolak tuntutan balas defendan dengan kos:

(1) Surat tawaran plaintif untuk belian bertarikh 1 Jun 2010 menetapkan pihak-pihak, hartanah dan harga belian adalah 'open contract' (lihat perenggan 8).

(2) Hujahan bahawa surat peguam defendan bertarikh 26 Mei 2010 kepada peguam plaintif yang menyebabkan surat tawaran plaintif bertarikh 1 Jun 2010 mempunyai perkataan 'Subject to contract' menunjukkan kontrak formal diperlukan, disangkal melalui tindakannnya sendiri pada 1 Julai 2010 mengkehendaki peguam plaintif berlaku adil kepada SPA. Walaupun D2 menyatakan dia tidak bersetuju dengan kesemua terma-terma dan syarat-syarat suart tawaran plaintif dia walau bagaimanapun bersetuju dengan syarat-syarat atas harga belian dan deposit cengkeram. Kekurangan SPA yang dilaksanakan secara formal oleh kedua-dua pihak tidak perlu bermaksud tidak terdapat perjanjian yang selesai (lihat perenggan 10–11).

(3) Perkataan-perkataan 'subject to contract' tidak bermaksud kontrak formal mesti dilaksanakan sebelum ia dapat dikatakan terdapat kontrak mengikat. Kesemuanya bergantung ke atas fakta kes dan matriks fakta di sini menunjukkan tidak perlu terdapat kontrak formal (lihat perenggan 12).

(4) Ketiadaan perjanjian formal dalam masa 21 hari bekerja yang ditetapkan tidak mengurangkan kes plaintif untuk alasan bahawa perjanjian formal tidak perlu untuk membuktikan kewujudan perjanjian yang selesai dan syarat-syarat di dalam surat tawaran dibacakan secara keseluruhan (lihat perenggan 13).

(5) Pindaan tidak mengurangkan daripada kemuktamadan perjanjian yang diselesaikan pada 1 Julai 2010 (lihat perenggan 15).

(6) Walaupun tidak terdapat bayaran baki sebanyak 8% ini tidak bermaksud tidak terdapat perjanjian yang telah selesai (lihat perenggan 16).

(7) D2 sebagai seorang bankrap tidak kekurangan kapasiti untuk memasuki ke dalam apa-apa perjanjian (lihat perenggan 17).

(8) Memandangkan tanah tersebut telah dijual kepada pihak ketiga pelaksanaan spesifik tidak wajar dengan itu tuntutan alternatif tersebut dibenarkan (lihat perenggan 20).]

Notes

For cases on breach, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6067–6086.

For cases on sale of land by undischarged bankrupt, see 1(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 3102–3104.

For cases on subject to contract, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4733–4744.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprise Sdn Bhd [1994] 2 MLJ 754; [1994] 3 CLJ 133, SC (refd)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

Ho Kam Phaw v Fam Sin Nin [1998] 2 MLJ 713; [1998] 3 CLJ 708, CA (refd)

Kwan Chew Shen v Citibank, NA [1987] CLJ (Rep) 704, HC (refd)

MWE Properties Sdn Bhd v Saw Lip Kean [2011] 8 CLJ 172, CA (refd)

New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd [1995] MLJU 25; [1996] 4 CLJ 94, HC (refd)

Legislation referred to

Contracts Act 1950 ss 10, 11
Probate and Administration Act 1959 ss 20, 21
Trustees (Incorporation) Act 1952

Loi Kwong Fon (Tew Min Sew with him) (Loi & Co) for the plaintiff.
Sonia Jayantkumar Shah (Ooi Neng with her) (Mak, Ng & Lim) for the defendant.

See Mee Chun JC:

[1] This is a claim by the plaintiff for the specific performance of an agreement for the sale and purchase of land held under HS (M) No 12554 No 3811 Mukim Sungai Buloh Daerah Petaling ('the land') which the plaintiff says was concluded on 1 July 2010. Alternatively plaintiff claims for refund of RM65,000 paid as earnest deposit and an equivalent sum of RM65,000 as liquidated damages. The defendant denies there was ever any agreement concluded but only negotiations and a draft agreement; if at all there was any agreement reached the plaintiff's subsequent proposal of an amendment and the lack of a duly executed agreement within the required 21 days meant there was no concluded agreement. Further D2 had been adjudged a bankrupt and lacked the capacity to enter into any contract. The defendant counterclaimed for general damages for losses arising from a caveat on the land lodged by the plaintiff.

[2] The primary issue is whether as at 1 July 2010 there had been a concluded agreement for the sale and purchase of the land.

[3] It was an agreed fact the plaintiff had paid the defendant RM65,000 as earnest deposit. This represented 2% of the 10% deposit. From the evidence both parties had been represented throughout the transaction; the plaintiff by Yu & Ling ('the plaintiff's lawyer') and the defendant by Hing & Elvin ('the defendant's lawyer'). On 1 June 2010 the plaintiff's lawyer issued a letter to the defendant's lawyer (B 3–4, P's offer letter) enclosing a cheque for the earnest deposit. This was in response to the defendant's lawyer letter dated 26 May 2010 (B1) they were acting for the defendant and requesting the draft sale and purchase. As per the plaintiff's offer letter this was part payment towards the account of the purchase price payable to the defendant's lawyer as stakeholders subject to terms and conditions. These related to purchase price of RM3.26m, terms of payment, vendor not to be an undischarged bankrupt and all terms and conditions in accordance with normal conveyancing practice.

[4] Much reliance was placed on conditions 6, 7 and 11 and they are reproduced as follows:

> 6. Our clients hereby undertake to execute the SPA within twenty one (21) working days (the Said Period) from the date of acceptance or deemed acceptance of this offer (SUBJECT TO the finalization of the SPA) failing which the earnest deposit shall be forfeited and thereafter this offer to purchase shall be rendered null and void and neither party shall have any rights over the other party thereafter.
>
> 7. In the event the Vendor fails to execute the SPA within the Said Period (SUBJECT TO the execution of the SPA by me) the Purchaser shall be entitled EITHER TO:
>
> (i) the remedy of specific performance against the Vendor at the Vendor's cost and expense; OR
>
> (ii) to terminate this Agreement whereupon the Vendor shall refund or cause to be refunded to the Purchaser the earnest deposit together with a further sum equivalent to the earnest deposit as the agreed liquidated damages and thereafter the offer to purchase shall be declared null and void and neither party shall have any rights over the other party thereafter.
>
> 11. that the earnest deposit shall be refunded to our client and without any deduction in the event our client is unable to secure a loan to assist him in the purchase of the above property.

EVIDENCE

[5] It is the evidence in chief of the plaintiff's director Mr Wong Tuck Heng (PW2) through his witness statement WSP2 he signed the sale and purchase agreement in B 18–34 on 11 August 2010 (signed S & P) and issued the

balance deposit of RM260,000 by cheque as in B 47. He was informed by his lawyer on 5 August 2010 that defendant had not signed the sale and purchase agreement. Public Bank had granted a loan for the purchase of the land as in letter of offer in B 35–46. Although as at 5 August 2010 he knew defendant was not proceeding with the agreement he proceeded to sign S & P as he was sincere in purchasing the land and it was not reasonable and fair for defendant to increase the purchase price when it had been agreed on. In cross examination PW2 agreed the earnest deposit was returned to him and he had not cashed it. As to his claim of the second RM650 this was on the basis of breach by vendor but he didn't know where such a clause could be found in signed S & P. He agreed vendor had not signed S & P and he had asked for an additional clause 5.2 to be inserted one month after the final draft. He was informed by his lawyer that D2 was a bankrupt. Although he could not remember when he had been informed he disagreed it had been when he signed S & P. He didn't know his lawyer had not sent the balance RM260,000 and the signed S & P to the defendant's lawyer. In re-examination he stated he had not taken the earnest deposit as the vendor had been in breach. As to how the second RM65,000 was obtained this was when the translated contents of S & P were read to him and his lawyer advised this could be claimed.

[6] Ms Ling Lay Choon from Yu & Ling who represented the plaintiff during the purchase gave evidence as PW3. Her witness statement marked as WSP3 showed she prepared the offer letter dated 1 June 2010 enclosing the earnest deposit and stating the terms and conditions of purchase. She prepared the draft S & P and on 1 July 2010 received an email from the defendant's lawyer confirming to fair S & P for execution (B11). She emailed the defendant's lawyer on 4 August 2010 (B 12) with the plaintiff's instruction of a minor amendment on clause 5.2. This related to vacant possession. On 5 August 2010 she received an email to the effect defendant is not agreeable to the terms of S & P (B15). She had conducted a bankruptcy search and found D2 was a bankrupt and accordingly emailed to defendant's lawyer on 5 August 2010 (B14). No reason was given by the defendant's lawyer as to why they did not agree to clause 5.2. By letter dated 12 August 2010 (B6) the defendant's lawyer wrote that the defendant is not in a position to enter S & P and returned the earnest deposit. She replied the plaintiff did not agree to the termination and returned the cheque for the earnest deposit. In cross examination PW3 disagreed the request for amendment one month after draft S & P had been finalised meant there was no consensus. This was because the agreement had been finalised and the amendment was minor. The amendment was not in the bundle but it had been sent to the lawyer. She was referred to the requirement of 21 working days for signing S & P and agreed if finalisation was on 1 July 2010 and S & P was signed on 11 August 2010 this would be more than 21 working days. She disagreed the pre condition had not been satisfied as there were other conditions. She was not aware of D2's bankruptcy prior to 5 August 210. She had not done a search then. She had not advised PW2 to sign S & P

after knowing of D2's bankruptcy. She said she could not deny she had no knowledge PW2 was going to sign but she could not stop him from signing. PW2 had not given her the signed S & P nor the cheque for the balance RM260,000 and neither had she sent them to the defendant's lawyer. She disagreed as there was 'no consensus, no signed S & P. No 8% and therefore no agreement' as there was an offer to purchase. The fact D2 was bankrupt did not make the agreement void as he was an administrator. On the one month from 1 July 2010 to 5 August 2010 this was because the plaintiff was waiting for his loan as stated in condition 11 of letter of offer. She was asked 'It doesn't say can hold the signing' to which she replied 'If S & P signed without loan we give up our right on this pre condition'. There is no conflict with the requirement of 21 working days as the conditions must be read together. The liquidated damages was pursuant to condition 7(ii). She disagreed as there was no execution condition 7 did not apply. When the amendment was forwarded to the defendant's lawyer she was informed they didn't agree to it. The plaintiff was ready to sign S & P and the search was done. She expected them to rectify as D2 was only an administrator and not owner. In re examination she was referred to B 14 on her proposal to rectify the issue of D2 being a bankrupt. She confirmed there was no clause 5.2 in the signed S & P.

[7] D2 gave evidence in chief (witness statement WSD1). He confirmed the receipt of earnest deposit and stated the terms and conditions in the draft S & P were not finalised as no action was taken by the plaintiff's lawyer after 1 July 2010 and that after a month there was an amendment to the draft which he didn't agree with. He said the plaintiff's amendment was a delaying tactic. He decided not to continue with the negotiation and instructed his lawyer to return the earnest deposit. The plaintiff did not accept the refund and returned the cheque. The other reason for not proceeding was because he was a bankrupt. He knew this through his lawyer. Neither he nor D1 had signed the S & P and were not aware the plaintiff had signed prior to this case. The earnest deposit is still with the defendant's lawyer. The defendant had applied to remove the caveat which was done on 24 November 2010. The bankruptcy order was set aside in May 2012. In cross examination he said he did not agree with all the terms in offer letter. To a question what was it he did not agree to he replied 'for the plaintiff to amend the terms of agreement'. He agreed with the conditions on purchase price and earnest deposit. He did not agree with condition 7 and said this was because the amendment came one month later. He confirmed there was no clause 5.2 in signed S & P. He wouldn't know if the amendment did not have any impact as there was no such clause in signed S & P. He had not signed S & P as the amendment was proposed a month later and because he was a bankrupt. He was made administrator after his father's death in 1998 and was a bankrupt in 2007 as per search in C1. He disagreed in 2007 he knew he was a bankrupt. Since 2010 his name was in the title to the land in his capacity as administrator. In re-examination he stated throughout the transaction he had never met purchaser and everything had been dealt by his

lawyer.

FINDING

(a) Whether there was a concluded agreement as at 1 July 2010

[8] The defendant had confirmed receiving the plaintiff's offer letter to purchase dated 1 June 2010 and the earnest deposit. The plaintiff's offer letter setting out parties, property and purchase price was an 'open contract' as per *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 at p 336; [1997] 1 CLJ 625 at p 634 which states:

> If a contract for sale specifies merely the names of the parties, a description of the property and statement of the price, it is called an open contract. When this form of contract is made, the parties are bound by certain conditions implied by the law.

[9] Then came the defendant's email through its lawyer dated 1 July 2010 to the plaintiff's lawyer 'You may proceed to fair the same for our client's execution'. This is a clear indication as at 1 July 2010, the defendant had agreed to the terms and conditions in the plaintiff's offer letter of 1 June 2010 otherwise it would not have asked the plaintiff's lawyer to fair the S & P.

[10] The argument that the defendant's lawyer's letter of 26 May 2010 to the plaintiff's lawyer in B 1 which prompted the plaintiff's offer letter of 1 June 2010 had the words 'Subject to contract' showed a formal contract was required is negated by its own conduct on 1 July 2010 requiring the plaintiff's lawyer to fair the S & P. Although D2 had said he did not agree with all the terms and conditions in the plaintiff's offer letter he nevertheless agreed with the condition on purchase price and earnest deposit. Refer to *Charles Grenier Sdn Bhd*'s case which was cited in *MWE Properties Sdn Bhd v Saw Lip Kean* [2011] 8 CLJ 172. Hence in *MWE Properties Sdn Bhd*'s case it was stated at p 182:

> … the court is satisfied that there was a concluded contract … despite the want of a duly executed formal written agreement. All the necessary ingredients to constitute a contract were in existence through the proforma forms signed by the respondent, the exchange of correspondences that follows as well as the conduct of parties. There was an offer by the parties, there was consideration, certainty of parties, certainty of the property … and certainty of the price…

[11] Here too it was only the plaintiff who signed the S & P on 11 August 2010 despite knowing as at 5 August 2010 the defendant would not be proceeding with the transaction. However as recognised by *MWE Properties Sdn Bhd*'s case the lack of a formally executed S & P by both parties does not necessarily mean there can be no concluded agreement. In our instant case the

ingredients of a concluded agreement were by the defendant's acceptance of the offer as evident by the defendant's lawyer's email of 1 July 2010 to fair the S & P and the defendant's evidence he had agreed to the purchase price and earnest deposit. It was never suggested there was no certainty of parties or property.

[12] The defendant had referred to *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprise Sdn Bhd* [1994] 2 MLJ 754; [1994] 3 CLJ 133 where it relied on held [3] as follows:

> Having regard to the several essential matters which still remained to be settled between the parties and taking into consideration the vital qualifying clause 'subject to the following terms and conditions' and condition (iv) that followed which categorically stated that the terms and conditions would be constituted in the form of an agreement between the parties, the letter of 19 September 1984 on its proper construction did not constitute a contract binding in law upon the parties. It was only a record of terms upon which they were agreed as a basis for the negotiation of a contract and which may aptly be called a Letter of Intent and nothing more…

The aforesaid para 3 is however preceded by held [1] as follows:

> It is well settled that when an arrangement is made 'subject to contract' or 'subject to the preparation and approval of a formal contract' and similar expressions it will generally be construed to meant that the parties are still in a state of negotiations and do not intend to be bound unless and until a formal contract is exchanged. On the other hand it is also true that merely because the parties contemplate the preparation of a formal contract that by itself will not prevent a binding contract from coming into existence before the formal contract is signed.

This essentially shows the words 'subject to contract' does not mean a formal contract must be executed before it can be said there is a binding contract. It all depends on the facts of the case and the factual matrix here shows there need not be a formal contract.

[13] Condition No 6 in the offer letter required the plaintiff to execute the sale and purchase within 21 working days of the defendant's acceptance. It was the defendant's contention taking 1 July 2010 as the date of finalisation and 11 August 2010 as the plaintiff's date of signing, the requisite 21 working days would have been exceeded such that the earlier agreement cannot hold. The conditions in the offer letter should be read as a whole and in condition No 11 is stated the earnest deposit shall be refunded to the plaintiff if he is unable to secure a loan to assist him in the purchase of the land. Although it is not expressly stated the sale and purchase agreement can be put on hold pending the securing of a loan it was explained by PW3 if the sale and purchase had been signed without the securing of a loan this would have meant they had given up their right to condition No 6. Hence the lack of a formal agreement within the stipulated 21 working days does not detract from the plaintiff's case for the reasons that a formal agreement is not necessary to prove the existence of a

concluded agreement and the conditions in the offer letter are to read as a whole.

(b) Amendment

[14] D2 had given evidence the terms and conditions in the sale and purchase were not finalised as the plaintiff had subsequently proposed an amendment one month later on 5 August 2010. It was therefore contended even if there had been a concluded agreement on 1 July 2010 the proposal of an amendment even if minor, meant there was no consensus and parties were back to negotiations. Although the amendment was not included in the bundle the email of the plaintiff's lawyer dated 5 August 2010 had the words 'to make some minor amendments on clause 5.2 (see attachment)'. I would accept there had been an attachment thereby showing the amendment had been sent as otherwise the defendant's lawyer would have responded there was no attachment. As to the nature of the amendment PW3 had explained it was on vacant possession and a minor one. There is no reason not to accept her evidence and the fact the plaintiff had signed the sale and purchase on 11 August 2010 without cl 5.2 shows it was minor.

[15] The defendant had referred to *Ho Kam Phaw v Fam Sin Nin* [1998] 2 MLJ 713; [1998] 3 CLJ 708 and *New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd* [1995] MLJU 25; [1996] 4 CLJ 94 that amendments meant no consensus had been reached. In *Ho Kam Phaw*'s case there had been two drafts of settlement agreements and in *New Selangor Plantations Sdn Bhd*'s case there had been 'various amendments, variations, counter proposals, alterations, additions and deletions' as contrasted with this case where there is one minor amendment which even then was not inserted in the signed S & P. Hence this amendment does not detract from the finality of the concluded agreement as at 1 July 2010.

(c) Balance deposit

[16] Although there was no payment of the balance 8% this does not mean there was no concluded agreement for the reasons given earlier.

D2 A BANKRUPT

[17] The next issue to consider is whether D2 being a bankrupt lacked the capacity to enter into any agreement. D2 is an administrator to his late father's estate and became a bankrupt in 2007 and his bankruptcy order was set aside in May 2012. The defendant referred to *Bankruptcy Handbook* (2nd Ed) MLJ Handbook Series 2004 where it is stated at p 69:

When a debtor is adjudged a bankrupt, he is disqualified from holding any of the positions of trust or high office:

…

(b) Trustee under any written law including appointment as administrator of the estate of the deceased;

…

A bankrupt cannot be an administrator or executor of a deceased's estate. The bankrupt, if holding such office, must be removed and replaced because he cannot be a trustee for any trust estate for persons under disability.

[18] As against this plaintiff referred to ss 10 and 11 of the Contracts Act 1950 as to what agreements are contracts and competence to contract. The persons competent to contract are those of age of majority, sound mind and not disqualified from contracting by any law to which they are subject. Sections 20 and 21 of the Probate and Administration Act 1959 were also referred where only minors and lunatics are not to be appointed administrators. *Kwan Chew Shen v Citibank, NA* [1987] CLJ (Rep) 704 was cited to the effect there is no provision a bankrupt is incapable of making a contract.

[19] In this regard I agree with the plaintiff's submissions as Probate and Administration Act 1959 is the specific law relating to appointment of administrators and it only states minors and lunatics are not to be appointed administrators. The passage from *Bankruptcy Handbook* refers to 'trustee under any written law' which is the Trustees (Incorporation) Act 1952 and does not apply in this instant case. Further *Kwan Chew Shen*'s case has stated at p 708:

… while persons of unsound minds are specifically excluded from being competent persons to enter into contracts by s 11 of the Contracts Act, bankrupts are not. … there appears to be no blanket provision anywhere to the effect that a bankrupt is incapable of making a contract.

To this I add this would be more so when the bankrupt is the administrator and not owner of the land. The words 'must be removed and replaced because he cannot be a trustee for any trust estate for persons under disability' mean the appointment is in respect of persons under disability which is not the case here.

RELIEF

[20] The plaintiff had claimed for specific performance and in the alternative the return of the earnest deposit and an equivalent of RM65,000 as liquidated damages. As the land has been disposed to a third party specific performance may not be appropriate such that the alternative claim will be allowed. On

liquidated damages the basis relied on is condition 7(ii) in the plaintiff's offer letter which has been fulfilled as there had been a concluded agreement as at 1 July 2010.

[21] The defendant's counterclaim for general damages arising from the plaintiff's caveat must necessarily be dismissed.

CONCLUSION

[22] The plaintiff's claim in paras 10(c) and (d) of amended statement of claim is allowed and the defendant's counterclaim is dismissed. Costs to plaintiff.

Plaintiff's claim for damages allowed and defendant's counterclaim dismissed with costs.

Reported by Kanesh Sundrum